IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6299 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHREEJI TRADERS

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 6299 of 2002
M/S TRIVEDI & GUPTA for Petitioner No. 1-2
MR DN PATEL for Respondents

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 13/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel, learned senior standing counsel waives service of Rule for the respondents.

2. In this petition under Article 226 of the Constitution, the petitioners have challenged the order dated 30.3.2001 passed by respondent No.3-Deputy Commissioner of Customs, Bhavnagar at Annexure "A" to the petition.

3. The facts leading to filing of this petition, briefly stated, are as under :-

Petitioner No. 1 is a partnership firm engaged in the business of ship breaking. Petitioner No. 2 is one of its partners. The petitioners had imported four ships for which four Bills of Entry were filed. The said Bills of Entry were assessed provisionally for determination of the correct and proper clarification of various items on board of the ships. Petitioner No.1 had executed necessary bond and made payment of customs duties. According to the petitioners, respondent No. 4 herein, the Assistant Commissioner of Central Excise, Bhavnagar passed final assessment orders without issuing any show cause notice and granting any opportunity of personal hearing. Those Bills of Entry were finally assessed and duty was demanded. Petitioner No. 1, therefore, filed appeals before the Commissioner of Customs (Appeals) who, by his order dated 21.10,1999, was pleased to allow the appeals and remanded the matters to the adjudicating authority with the following observations :-

"From the above discussion, it is crystal clear that the lower authority was bound to give opportunity to the appellants to represent their case, especially when the declaration given by the appellants as regards the quantity and value was not acceptable to him and he had some evidence to convince himself that these declarations were not true. These evidence were required to be given to the appellants for rebuttal and after taking into consideration the defence made by them on these evidences, the demands should have been confirmed. Moreover, there is also substance in the contention raised by the appellants that at the time of provisional assessment the only reason shown was that the clarification regarding the classification and levy of duty on moveable gears, bunkers, stores etc. was awaited from the Board and at that time and thereafter uptil the finalization of the assessments, no dispute was raised about the quantity and value. Therefore, it becomes more necessary to hear the appellants and thereafter

pass the necessary orders in accordance with the law. There is also a contention that the Board's circular has not been properly interpreted, in as much as, the reports of the Surveyors have stated that the fuel oil is contained in the engine room tanks, which are part of the ship. Had the lower authority given opportunity to the appellants for personal hearing, the evidences put forth by the appellants could have been appreciated by the authority and reasoned orders could have been passed.

11. It is in view of the above findings and in the interest of justice, I feel that these matters need to be remanded back to the lower authority for the purpose of de novo consideration after following the principles of natural justice. The lower authority shall take into consideration the submissions made by the appellants before this authority and discussed in above paragraphs and thereafter pass a speaking order in accordance with the law.

12. In view of the above findings, all the subject impugned orders are set aside only for the purpose of de novo consideration. The subject appeals are allowed by way of remand."

(emphasis supplied)

Pursuant to the aforesaid order of remand, the matters went back to respondent No.3-Deputy Commissioner of Customs. The hearing was fixed on 11.1.2001 and the petitioner was required to file reply by 9.1.2001. The petitioner requested by his letters dated 5.1.2001 and 23.3.2002 to furnish the petitioner with the grounds and documents relied upon by the department before finalization of the assessment. However, respondent No. 3 did not accede to the request and by letter dated 19.3.2002 called upon the petitioner to file their reply by 23.3.2002 and fixed the hearing on 26.3.2002. The request made by the petitioner on 23.3.2002 was also not accepted and respondent No. 3 proceeded to pass the impugned order dated 30.3.2001.

4. The petitioner's grievance is that the aforesaid order was passed by respondent No. 3 without furnishing any document or grounds as requested for by the petitioner and inspite of the specific directions given by the Commissioner (Appeals) in the order dated 21.10.1999 which are quoted hereinabove.

5. In response to the notice issued in the present petition, Mr DN Patel, learned senior standing counsel appears for the respondents. There is no affidavit in reply, but Mr Patel for the respondents has submitted that since the impugned order is an appealable order, this petition under Article 226 of the Constitution may not be entertained.

6. It is true that ordinarily this Court would not exercise its jurisdiction under Article 226 of the Constitution where the petitioner has an equally efficacious alternative available to him. However, as per the well settled legal position, the alternative statutory remedy does not oust the jurisdiction of this Court under Article 226 of the Constitution. Although the Court is generally loathe to exercise the jurisdiction when alternative remedy is available, it is merely a rule of prudence and a rule of caution. In Whirpool Corporation vs. Registrar of Trade Marks, Mumbai, AIR 1999 SC 22, the Apex Court has held that the alternative remedy would not be a bar in at least three contingencies, one of which is where there has been a violation of the principles of natural justice.

7. In the instant case, admittedly, the Commissioner (Appeals) had remanded the matter with a view to enabling the petitioners to have an opportunity of rebutting the evidence being relied upon by the department. The petitioners, therefore, went on requesting respondent No. 3 to furnish the petitioners with the copies of the documents in question. Respondent No. 3 did not accede to the said request and proceeded to pass the impugned order which has to be quashed and set aside as violative of principle of natural justice.

8. On this short ground, we allow this petition and set aside the impugned order dated 30.3.2001 at Annexure "A" passed by respondent No.3-Deputy Commissioner of Customs, Bhavnagar. The matter shall be heard by respondent No. 3 afresh after giving the petitioners copies of the documents as referred in the order dated 21.10.1999 of the Commissioner (Appeals) within one month from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier. Thereafter, respondent No. 3 shall give the petitioners an opportunity of personal hearing and decide the matter afresh in accordance with law.

9. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

sundar/-